No. 82-1539

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES O. DRUKER, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In this federal income tax case, petitioners seek review of the decision below[1] holding (1) that they were not entitled to compute their federal income tax liability for the years in question (1975 and 1976) as unmarried individuals; (2) that they failed to make a timely election to file jointly for those years; and (3) that they were liable for additions to tax under Section 6653(a) of the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V)) based on their intentional disregard of the statutory provisions at issue.

The pertinent facts may be summarized as follows: Petitioners filed separate income tax returns for 1975 and 1976, computing their respective tax liabilities under the rate table for unmarried individuals, even though they were

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[1]The opinion of the court of appeals (Pet. App. 24-45) is reported at 697 F.2d 46.

married at all pertinent times (Pet. App. 26). They assertedly took this action in the belief that the so-called "marriage penalty" (*i.e.*, the difference between the tax they were required to pay as a married couple and the smaller total liability that would have been imposed on them as unmarried persons) violates the Equal Protection Clause of the Fourteenth Amendment (Pet App. 26-27). On audit, the Commissioner determined that petitioners were subject to the rates applicable to married individuals filing separately and also asserted the five percent addition to tax under Section 6653(a) of the 1954 Code (26 U.S.C. (Supp. V)) for intentional disregard of rules and regulations (Pet. App. 27, 34, 37). After the notices of deficiency were issued, petitioners requested a recomputation of their deficiencies based on a joint filing status (Pet. App. 15). Shortly thereafter, they filed a timely petition in the Tax Court for a redetermination of the deficiencies.

The Tax Court upheld the constitutionality of the income tax rates (Pet. App. 16-19) and determined that petitioners were then precluded by Section 6013(b)(2) of the 1954 Code from electing joint filing status for the years in issue (Pet. App. 20-21). It further concluded, however, that petitioners should not be held liable for the five percent penalties imposed under 26 U.S.C. (Supp. V) 6653(a) for negligence or intentional disregard of rules and regulations (Pet. App. 22-23).[2] The court of appeals affirmed on the constitutional and joint filing issues, but reversed in favor of the Commissioner on the penalty issue (Pet. App. 33, 35-36, 44-45).

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[2]The Tax Court acknowledged that petitioners "took their action deliberately and in open disregard of the requirements of the statute" (Pet. App. 22). It held, however, that the penalty for intentional disregard of rules and regulations was not applicable because there was a "reasonable basis" for petitioners' action in light of the "widespread comment and discussion, including extensive legislative consideration," concerning the "marriage penalty" (Pet. App. 22-23).

1. This is the third case in which the courts have considered and squarely rejected a constitutional challenge to the differential in rates between single and married taxpayers, commonly referred to as the "marriage penalty." See *Mapes* v. *United States*, 576 F.2d 896 (Ct. Cl.), cert. denied, 439 U.S. 1046 (1978); *Johnson* v. *United States*, 422 F. Supp. 958 (N.D. Ind. 1976), aff'd, 550 F.2d 1239 (7th Cir. 1977), cert. denied, 434 U.S. 1012 (1978). The tax rate structure at issue[3] reflects two major reforms by which Congress sought to minimize differences between the tax burdens borne by various classes of taxpayers. First, in the Revenue Act of 1948, ch. 168, 62 Stat. 110, Congress enacted a provision enabling married persons to split their income with their spouses by filing joint returns. Prior to 1948, the reduction in tax usually associated with income-splitting was available only to married persons in community property states, where income-splitting occurs automatically by operation of law. See *Poe* v. *Seaborn*, 282 U.S. 101 (1930). The 1948 amendment was intended to eliminate the disparity in tax treatment between married couples in community property states and those in common law states, and, thus, to treat all married couples with equal amounts of aggregate income equally. See H.R. Rep. No. 1274, 80th Cong., 2d Sess. 24 (1948); S. Rep. No. 1013, (Pet. 1), 80th Cong., 2d Sess. 25 (1948).

As a result of the 1948 changes, however, the tax on a single person could exceed the tax on a married couple with the same income by as much as 40%.[4] See S. Rep. No.

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[3]See Section 1 of the 1954 Code.

[4]Single taxpayers had similarly argued that this "singles penalty" was contrary to due process of law. Those contentions were also uniformly rejected in the courts. See, *e.g.*, *Kellems* v. *Commissioner*, 58 T.C. 556 (1972), aff'd per curiam, 474 F.2d 1399 (2d Cir.), cert. denied, 414 U.S. 831 (1973); *Faraco* v. *Commissioner*, 261 F.2d 387 (4th Cir. 1958), cert. denied, 359 U.S. 925 (1959).

91-552, 91st Cong., 1st Sess. 260 (1969). In 1969, Congress sought to remedy that situation by revising the tax rates applicable to unmarried taxpayers. Section 802 of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 676. Under the new rates, however, the burden borne by certain married couples may be greater, in certain circumstances (for example, where each has approximately the same amount of income), than their combined tax burden would be if they were unmarried.[5] But such disparities are inevitable under any tax system that is progressive and that also seeks to tax equally all married couples with equal aggregate income by means of income-splitting. A progressive tax on a married couple simply cannot, at the same time, be equal to the tax on a single person with the identical taxable income, and also be equal to the combined tax on two single persons, each with half the taxable income of the married couple. In short, given the objectives Congress has selected, a totally "marriage-neutral" income tax is simply impossible. See Bittker, *Federal Income Taxation and the Family*, 27 Stan. L. Rev. 1389, 1395-1396 (1975). As the Seventh Circuit stated in rejecting an identical challenge to the tax rate structure, given the inherent complexity of the problem, "the inequities asserted to inhere in the 'marriage penalty,' whatever may be their persuasiveness as arguments for legislative change, do not rise to the level of constitutional violations * * *." *Barter* v. *United States*, 550 F.2d 1239, 1240 (1977) (footnote omitted).[6]

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[5]Congress has recently adopted yet a further reform to alleviate the "marriage penalty" effect of the 1969 changes. Section 221 of the 1954 Code, as added by Section 103 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 187, allows married couples, where both spouses have earned income, a deduction from gross income based on a percentage of the earnings of the spouse with the lower qualified earned income.

[6]The court below correctly rejected petitioners' assertion (Pet. 5) that the tax rates constitute an abridgement of the "fundamental" right to marry (Pet. App. 30-31). In *Zablocki* v. *Redhail*, 434 U.S. 374, 386-387

2. Petitioners also claim (Pet. 8-9) that they should have been permitted to file a late joint return at least for 1976, thereby avoiding the imposition of the higher rates applicable to married persons filing separately. But petitioners are now precluded from changing their filing status because they did not make a timely election to file a joint return pursuant to the requirements of Section 6013(b) of the 1954 Code.[7] Petitioners argue (Pet. 9) that their failure to make a

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(1978), this Court made clear that state regulations affecting "the incidents of or prerequisites for marriage" will not be subjected to strict judicial scrutiny unless they interfere "directly and substantially" with the decison to marry. As the court below recognized (Pet. App. 31), the tax rate structure does not prevent couples from marrying, nor does it interfere with the freedom to marry. Even if the more rigorous standard of strict judicial scrutiny were applicable, however, a compelling governmental interest inheres in the goals of reducing the differential between single and married taxpayers and in the provision of income-splitting for married couples. *Johnson* v. *United States, supra*, 422 F. Supp. at 973. See also Pet. App. 30-31.

Petitioners are also incorrect in their assertion (Pet. 6-7) that the decision below conflicts with *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931). *Hoeper* is plainly distinguishable in at least one crucial respect. The Wisconsin statute there at issue required that the separate income of the spouses be aggregated for tax purposes. Here on the other hand, in the federal tax system, aggregation of income via joint returns is optional, and not required, 26 U.S.C. (& Supp. V) 6013. While married persons filing separate returns will ordinarily pay more tax, in the aggregate, than if they filed jointly there is nonetheless no compulsory attribution of income between the spouses. Thus, *Hoeper* is inapposite. See *Mapes* v. *United States, supra*, 576 F.2d at 902; *Johnson* v. *United States, supra*, 422 F. Supp. at 967-968.

[7]Section 6013(b)(2)(C) precludes such an election "after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213." Here, petitioners did not seek the joint filing status prior to the mailing of the notices of deficiency, with respect to which they filed a timely petition with the Tax Court. Thus, as the court of appeals correctly held (Pet. App. 35-36), petitioners are precluded from exercising the switching privilege for either year by Section 6013(b)(2)(C).

proper and timely election under Section 6013(b) was due to the advice of Internal Revenue Service agents, but they failed to establish, as a factual matter, that the government had agreed to waive the requirements of the statute.[8] Even if such a showing had been made, however, the courts below correctly held (Pet. App. 21, 36) that the government is not estopped by any erroneous advice that its employees may have provided. See *Schweiker* v. *Hansen*, 450 U.S. 785, 786 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973).

3. Finally, petitioners argue (Pet. 7-8) that they should not have been held liable, in any event, for the five percent penalty imposed under Section 6653(a) of the 1954 Code. Section 6653(a) applies where any part of the underpayment of tax is "due to negligence or intentional disregard of rules and regulations (but without intent to defraud)."[9] Petitioners do not dispute that they intentionally disregarded the tax rates provided in Section 1 of the 1954 Code by using the rate schedule for unmarried individuals. They contend, however, that they should be excused from the

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[8]The evidence regarding the advice received by petitioners consisted of two letters written by petitioner James O. Druker himself after the notices of deficiency were mailed. Those letters asserted that an Internal Revenue Service agent had agreed to recompute petitioners' deficiencies on a joint filing basis. As the court of appeals noted (Pet. App. 35-36), the most that can be fairly inferred from these letters is that the agent had relieved petitioners of the need to file a formal amended joint return (see Section 6013(b)(1)), and not that she had agreed to waive the provision of Section 6013(b)(2)(C) barring a switch in filing status once the notice of deficiency has been mailed if the taxpayer thereafter chooses to file a petition with the Tax Court.

[9]Petitioners suggest (Pet. 7) that they had discussions with the United States Attorney and the Internal Revenue Service that led them to believe they could disregard the tax rates for married persons without incurring the Section 6653(a) penalty. The record demonstrates, however, that the discussions concerned only the possibility of penalties for "fraud or willfulness" (Tr. 5-6), and not the penalty for negligence or intentional disregard of rules or regulations.

penalty on the basis of an asserted "reasonable basis" exception to Section 6653(a). The court of appeals correctly rejected that contention, on the ground that petitioners' position was inconsistent not only with the language of Section 6653(a), but also with the case law and the legislative history of that provision.[10]

As the court of appeals correctly recognized (Pet. App. 39), while the term "negligence" in Section 6653(a) may carry with it an inferred "reasonable basis" limitation, the phrase "intentional disregard of rules and regulations" plainly does not. Petitioners' disregard of the tax rates was concededly "intentional" and that is all that Section 6653(a) requires. *Journal Co.* v. *Commissioner*, 46 B.T.A. 841, 845-846 (1942), rev'd on other grounds, 134 F.2d 165 (7th Cir. 1943), is the only other case that has squarely reached the question whether there is a "reasonable basis" exception to the intentional disregard portion of Section 6653(a) or its predecessors. There, the Board of Tax Appeals held that imposition of the penalty was mandatory even where the taxpayer reasonably believed, based on the advice of counsel, that a Treasury Regulation was invalid.[11]

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[10]Accordingly, it was unnecessary for the court of appeals to consider whether the Tax Court erred in holding that petitioner actually had a reasonable basis for disregarding the statute.

[11]Petitioners are incorrect in their assertion (Pet. 7) that the decisions here and in *Journal Co.* conflict with *Marcello* v. *Commissioner*, 380 F.2d 499 (5th Cir. 1967). There, the court suggested by way of dicta that the penalty may "possibly be avoided if the taxpayer, because of a mistaken conception of his legal rights failed to follow the rules and regulations" and might also be avoided "by excusing his actions with an acceptable and justified reason, such as have been accepted by courts in the past." *Id.* at 506 & n.20. Apart from the fact that these comments in *Marcello* were dicta, they are unsupported by the authorities cited therein, see *Bennett* v. *Commissioner*, 139 F.2d 961 (8th Cir. 1944) and M. Nessen, *The Line Between Negligence and Civil Fraud: The Operation of Two Penalty Provisions against Underpaying Taxpayers*, 20

As the court of appeals also noted (Pet. App. 41-42), the legislative history of Section 6653(a) further supports its reading of the statute. In 1954, the Senate Finance Committee proposed an amendment under which the penalty would not be imposed "* * * where a taxpayer in good faith intentionally disregards rules and regulations because he reasonably believes the rules or regulations are invalid and attaches to his return an adequate statement which sets forth the rules or regulations disregarded and the grounds for believing them invalid." S. Rep. No. 1622, 83d Cong., 2d Sess. 591 (1954). That proposal, however, was deleted in conference. H.R. Conf. Rep. No. 2543, 83d Cong., 2d Sess. 80 (1954). The clear implication is that Congress recognized that the penalty for intentional disregard did not depend on the reasonableness of the taxpayer's beliefs and chose to retain the rule set forth in *Journal Co.* v. *Commissioner, supra.*[12]

N.Y.U. Inst. on Fed. Tax. 1117 (1962). Indeed, the opinion in *Marcello* elsewhere cites *Journal Co.* v. *Commissioner, supra*, without suggesting that the case was incorrectly decided. 380 F.2d at 506 n.21.

Petitioners also contend (Pet. 7-8) that there are a number of other cases which support their position. *Commissioner* v. *S.A. Woods Machine Co.*, 57 F.2d 635 (1st Cir. 1932); *Hill* v. *Commissioner*, 63 T.C. 225 (1974); *Scott* v. *Commissioner*, 61 T.C. 654 (1974); *Miller* v. *United States*, 211 F. Supp. 758 (D. Wyo. 1962); *Brockman Building Corp.* v. *Commissioner*, 21 T.C. 175 (1953), aff'd, 231 F.2d 145 (9th Cir. 1955), cert. denied, 350 U.S. 936 (1956). But none of those cases dealt with the issue whether a "reasonable basis" exception exists in the case of intentional, as well as negligent, disregard of rules or regulations. As the court of appeals correctly noted (Pet. App. 41), all of the cited cases are distinguishable because the taxpayers there did not know they were disregarding rules or regulations, believed that they had complied with the regulations, or had been charged merely with negligence.

[12]In 1976, Congress adopted a "reasonable basis" exception to the "intentional disregard" portion of 26 U.S.C. 6694, which deals with the penalties imposed on income tax return preparers. The legislative history of Section 6694 indicates that this provision is "to be interpreted in

Finally, petitioners could have tested the constitutionality of the tax rates without incurring the Section 6653(a) penalty if they had paid the taxes requried by the statute in the first instance and then sued for a refund.[13] There is accordingly no basis for their suggestion (Pet. 7) that their opportunity to bring a test case is significantly limited by the imposition of the penalty.

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a manner similar to the interpretation given the provision under present law (sec. 6653(a)) relating to the disregard of IRS rules and regulations by taxpayers on their own returns." H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 278 (1975). The court below correctly declined (Pet. App. 43-44) to rely on these 1976 comments, in light of Congress' specific rejection of a "reasonable basis" limitation when it enacted Section 6653(a). As this Court has stated, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). Moreover, the court below also noted (Pet. App. 44) that the "reasonable basis" exception to the return preparer penalty under Section 6694 was intended only to cover circumstances in which there is a good faith dispute as to whether the Commissioner's rules and regulations are in accord with the Code, and not where the dispute concerns the validity of the statute itself.

[13]Section 6653(a) applies only where "any part of any *underpayment* * * * is due to negligence or intentional disregard of rules and regulations" (emphasis added). The opinion below (Pet. App. 40) correctly points out that this statutory scheme tends to insure that the collection of taxes is not unduly delayed and to deter taxpayers from abusing the prepayment review procedures available in the Tax Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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